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Supreme Court of the United States

OCTOBER TERM, 1937

No. 819

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR OF THE ESTATE OF MARY T. RYAN, DECEASED, PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1938.

CERTIORARI GRANTED MARCH 28, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 31, 1938.

[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, AT STAUNTON

MARY T. RYAN, Plaintiff in Error,

v.

COMMONWEALTH OF VIRGINIA, Defendant in Error.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS

To the Honorable Justice and Associate Justice of the Supreme Court of Appeals of Virginia:

Your petitioner, Mary T. Ryan, would respectfully show that she is greatly aggrieved by a final order of the Circuit Court for the County of Nelson, Virginia, entered on the 9th day of November, 1936, in the proceedings at law pending in said Court under the style of Mary T. Ryan v. Commonwealth of Virginia.

The Facts

The proceeding in question was a proceeding by way of application for a refund of income taxes paid to the State of Virginia on assessment made against the petitioner for the years 1931, 1932 and 1933, and which were paid by petitioner under protest, the said taxes aggregating the sum of $8,996.46. The said tax was assessed on income received by the said Mary T. Ryan during the three years in question from Trustees under a trust set up under the will of Thomas F. Ryan, a resident of the State of New York. The [fol. 2] questions raised are questions of law under the agreed statement of facts, the same questions applying to the whole of the tax assessed for the three years.

The facts are agreed and will be found set out in the "Stipulation of Facts" and exhibits filed as part of the record. The facts are simple and need not be repeated here. We call attention, however, to the following points:

1. That the additional tax assessed by the State and to which objection was made, was a tax on sums paid to Mary T. Ryan, a resident of Virginia, by the Trustees under the will of Thomas F. Ryan, a resident of New York.

2. That the trust from which the sums were paid is a New York trust; originating under the will of a resident of

New York; established under the laws of New York; managed and controlled by the proper court for the State of New York; the assets are all kept in New York; and the Trustees are residents of New York. In short, it is entirely a New York trust, and subject to the laws of that State.

3. The trustees under the laws of New York pay, and have paid yearly a state income tax on the total Mary T. Ryan income from the trusted estate, the assessment being made under Section 365 of the New York Tax Code, which to all intents and purposes is identical with Section 50 of the Virginia Tax Code, dealing with tax on estates and trusts, practically the only difference between the two being the necessary difference in references.

4. There was no wilful failure or refusal of the petitioner to furnish a list of her property or income to the tax authorities.

5. The amounts paid to the petitioner were paid by the Trustees under Article IV; Section F, of the will of Thomas F. Ryan. The will divides the estate in the hands of the Trustees into fifty-four equal parts, and provides that the Trustees should pay to petitioner during her life such part of the income from twelve of said equal parts as they in their sole discretion may determine to be necessary and proper for her care, support, and comfort, in such installments and at such intervals as they in their sole discretion may determine. Provision is made for the residue of said income not so used, and for the disposition of the principal at the death of the petitioner, which is not involved in this proceeding.

6. The additional tax assessed for the years 1931, 1932, and 1933, and aggregating $8,996.46, was assessed on ac- [fol. 3] count of these payments made by the Trustees, and which had not been included by petitioner in her returns for the years in question as income subject to taxation.

7. The tax has been paid by petitioner under protest, and this proceeding is to correct the alleged erroneous assessment.

8. The tax as assessed was fixed after proper deductions as provided by Section 25 of the Virginia Tax Code.

9. It is stipulated as a fact that petitioner has filed her income tax report with the United States Government for

Federal income tax returns for each of the years in question, and has included in such returns the amounts paid to her by the Trustees, without protest, and with no application for correction. Objection is made, as provided in the "Stipulation of Facts" to the relevancy and pertinency of this fact, on the ground that it is immaterial. What has been done with reference to the returns to the Federal Government under the Federal Statute has no bearing on the question here. The question is simply whether the sums paid to Mrs. Ryan from the trust are taxable as income under the Virginia Statute. Under the Federal law, the income of a discretionary trust is taxed directly to the trustees, to the extent that it is not distributed to the beneficiary, or to the beneficiary to the extent that it is distributed. The Virginia State taxes the income of a discretionary trust directly, and only to the trustees, regardless of distribution.

10. It is also admitted in the "Stipulation of Facts" that the Trustees made regular Federal returns, and in which returns the payments made to the said Mary T. Ryan are shown, and it is left to her to report such payments to her in her Federal returns, which was done. The same objection on the same grounds is made as to the relevancy or materiality of this admission of fact.

Assignment of Error.

Petitioner assigns as error the refusal of the Court to correct the alleged wrongful assessment, and to direct that there be repaid to the petitioner the amount wrongfully collected from her.

Questions Before the Court

The questions raised in the petition and now relied on are two in number, and which will be discussed in order.

[fol. 4] First. The sums paid to the petitioner by the New York Trustees of the New York trust were not properly taxable to Mary T. Ryan under the Virginia laws.

Second. If the statute be construed to make the income taxable in Virginia, it would be unconstitutional under the Fourteenth Amendment to the Federal Constitution.

First. Were the Payments by the Trustees Subject to the Income Tax Under the Laws of the State of Virginia?

In discussing this question, it will be necessary to consider the following points:

(A) Was the tax in the instant case authorized under the provisions of the Virginia tax law?

(B) It will be necessary to discuss, in considering question (A) the obvious purpose of the Virginia tax law, as shown in its various provisions to prevent double taxation on income, such as would necessarily exist if the contention of the State here should be upheld.

All italics in this Note are supplied.

(A) Was the tax in the instant case authorized under the provisions of the Virginia tax law?

The Virginia statutes classify taxpayer for the purpose of income taxation under separate and distinct headings of (1) Individuals; (2) corporations and partnerships; and (3) estates and trusts. Sections 50 and 51 of the tax law deal with income tax on estates and trusts, and specifically impose taxes on the entire income of a discretionary trust against the Trustee, and not against the beneficiary. The pertinent provisions of Sections 50 and 51 are as follows:

"Sec. 50. Estates and trusts.—1. The tax imposed by this chapter upon individuals shall apply to estates and trusts, which tax is hereby levied annually upon and with respect to the income of estates or of any kind of property held in trust, including:"

"d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals * * *:"

"3. In cases under paragraphs a, b, and c of sub-[fol. 5] division one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, except (exceptions not pertinent). * * * In such cases, the estate or trust shall be allowed the same exemption as is allowed to single persons by this chapter; and in such cases an *estate or trust created by a person not a resident*, and an *estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under this chapter.*

"4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of income is *in the discretion of the fiduciary,* either as to the beneficiaries to whom payable or as to the amounts which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary * * *."

Section 50 of the Tax Code is identical in all respects, except necessarily in the references, to Section 365 of the New York tax law. Sub-section d of sub-division 1 and sub-division 4 are the specific provisions for tax on income to be distributed periodically, and where the amount of distribution is discretionary with the fiduciary either as to beneficiaries or amounts, and therefore cover cases such as the one at bar. It is to be noted that in Virginia (as in New York) the income tax on a discretionary trust is paid by the *fiduciary* for the *whole* income from the trust and no beneficiary is directly assessed thereon—thus providing for one state tax and only one on the same subject. This is further reinforced by the provisions of sub-section 3, where it provides that in case of a trust created by a non-resident, it shall be taxed "only to the extent to which individuals other than a resident are taxable" i. e.—only on income from Virginia sources.

It will be noted that there is no distinction in the statutes between a resident and a non-resident trust. The statutes having provided for the taxation of income of trust to the Trustee, it is not competent for the tax authorities to disregard the classification of the statutes and attempt to tax the income from the trust to an individual as individual [fol. 6] income. The fact that the trust is a non-resident trust is a mere circumstances and cannot change the law. In fact, sub-section 3, of section 50, specifically shows the intent of the Legislature that the section is to govern both resident and non-resident trusts, in that it provides that the income on trusts created by a non-resident is to be "*subject to tax only to the extent to which individuals other than residents are liable to under this chapter.*" This part of sub-division 3 is made applicable by sub-division 4, and makes trustees of non-resident trusts taxable only to the

extent to which an individual other than a resident would be taxable, and thus would make trustees of a non-resident trust (as in the case at bar) taxable on the income of such trust only to the extent that they receive income from property owned and from business, trade, or profession or occupation carried on in Virginia. (See Tax Code, Section 38.)

It is a principle too well established to need citation that "statutes laying taxes are strictly construed against the taxing power and are not to be extended beyond the clear import of the language used." U. S. v. Merriman, 44 Sup. Ct. Rep. 69, 68 L. Ed. 240. See also 25 R. C. L. 1090.

The Virginia Trust Income Tax Law (identical with the New York law as shown above) provides that in case of a discretionary trust such as this one, the income is to be taxed to the Trustee without deduction for the amounts distributed to the beneficiary. In other words, the tax is levied on the Trustee, and not on the beneficiary. The purpose of so levying the tax is explained by Mr. Justice Cardozo (then Judge of the Court of Appeals of New York) in People, ex rel., Bank of America, et al., v. Gilchrist, 244 N. Y. 56, 154 N. E. 821 (1926). In that case, in sustaining the constitutionality of substantially identical provisions of the New York Tax Law, Mr. Justice Cardozo said:

"* * * Public policy demands that the state shall know the income upon which its taxes are to be based. If the determination of the shares is left to the discretion of the trustees, there may be an indefinite period during which the interests of the beneficiaries will be left in suspense. The result, so far as the taxing authorities are concerned, will be [fol. 7] very nearly the same as if there were a trust for accumulation * * *."

"* * *

"The return day arrives. The trustee has paid a certain proportion of the income to one of the beneficiaries. He has not yet made up his mind as to the needs of the others. The beneficiaries cannot be taxed until his determination is announced. The only way to reach the income in the interval is to lay the tax upon the trust. In this particular case, the risk of delay or evasion may be slight, for here the trustees are directed to make their allotment annually. Even so, they might postpone the performance of their duty, and leave the basis of the tax uncertain. * * *

"Taken by and large, income presently appropriated to the use of beneficiaries is in a class separate and apart for purposes of taxation from income to be appropriated thereafter in the exercise of discretion. The Legislature did not exceed its power when it gave effect to the difference in the imposition of the tax."

Thus, it is clear that the purpose of a statute such as section 50 (4) of the Virginia Tax Code is to tax the income of a discretionary trust to the trustee and not to the beneficiary, to prevent the tax avoidance or delay which could be caused by the trustee's distributing at his will if the income were taxable to the beneficiary on distribution.

In some other states there are specific provisions taxing the resident beneficiary of a non-resident trust. See, for example, Section 62, Chapter 11, General Laws of Massachusetts, and also Hutchins v. Long, Com'r. (Mass.), 172 N. E. 605, 71 A. L. R. 677, 681. There is no such statute in Virginia. Had it been, the purpose of the Legislature to tax sums received from a non-resident trust, it would have adopted a statute for the purpose, as did the State of Massachusetts.

In the absence of any such specific provision in the Virginia tax law as to income, it seems clear that no tax can be levied on the income distributed to a resident beneficiary of a non-resident discretionary trust. The tax is to be levied on the trustee if such trustee has income from sources in Virginia.

In the instant case, the Trustees pay tax on the entire [fol. 8] income of the trust estate to the State of New York. It is true that Mrs. Ryan personally paid nothing to the State of New York, but amounts paid to her had already been subjected to tax under the New York trust income tax provision, which, as stated, is practically identical with the Virginia provision. It would seem to make little difference whether under the New York law the Trustees should be required to pay the tax, instead of requiring the Trustees to report and individuals to pay, from sources in the State of New York. The effect is the same. The tax has been placed on all the income of the trust estate.

It must be admitted that, under Section 39, if the New York Law, instead of placing the tax against the trust,

should place it against the individual, and then should collect the tax from Mrs. Ryan, on account of the amount received by her from sources in the State of New York (the New York trust), Mrs. Ryan would be entitled to the credit provided for in Section 39. Why should there be a different rule because of the fact that instead of collecting the tax directly from Mrs. Ryan, the State of New York collects it from Trustees? The effect is the same in either case. Why should Virginia discriminate against a resident merely on account of the method which the State of New York takes to collect the tax on the income from the trust, i. e., directly from the Trustees rather than from the beneficiary, when there is no real difference?

It is submitted that sections 50 and 51 cover the entire field for taxation on income from trusts and that such income can be taxed only under those sections; that the statute makes no distinction whether such income be from a trust of some other state or of Virginia; that the failure to make such distinction and failure to pass a statute as did other states to tax receipts from foreign trusts, is significant and controlling; that it is not competent for the Tax Commissioner to disregard the plain mandate of the Statute; and that any income tax on the subject here involved must be assessed against the Trustees as such. If there be no income from Virginia sources which can be taxed against the Trustees, there is no authority for assessment here at all.

When during his life time Mr. Ryan gave to Mrs. Ryan such sums as he thought proper for her maintenance, clearly it was not income to her nor taxable as such. If while alive he had set up a discretionary trust to provide the same maintenance the trust would pay the income tax on the assets instead of his paying it, and the result would [fol. 9] have been the same. So when the discretionary trust is set up in his will or continues after his death—the trustees pay the income tax and the result is the same. There is no change in effect in either case, whether the husband gives directly as he thinks proper or through a trust as the Trustees think proper. The result is the same so far as the State of Virginia is concerned, and as we see it the statutes are drawn accordingly. Why should there be any difference?

B. The manifest purpose of the Virginia Statute to prevent double taxation.

We have dealt above with the provisions of the Virginia tax law with reference to the income tax on trusts, and have shown that such income is taxable only to the Trustee and not to the beneficiary. The purpose of this, of course, is to prevent double taxation, so that both the trust and the beneficiary will not be paying the tax.

The same purpose is shown in the other provisions, as follows:

(1) Income Tax on Individuals

The income tax on individuals is provided for in Sections 36-49, inclusive, of the Tax Code. It is to be noted that Section 38, to avoid double State taxation, provides as to non-residents that they shall be taxed only on income "from all property owned and from every business, trade, profession or occupation carried on *in this state*," and where he has income from such property or activities both within and without the State, he is taxed only on income "from labor performed, business done, or property located *within the State.*"

Section 39 provides as to residents that on income derived from sources without the State, the tax payer shall be credited on his return with the income tax paid by him to such other State, provided such other State does not provide for a credit to such resident of Virginia substantially similar to that granted by Section 40.

Section 40 provides that where non-residents are liable to income tax in the State of residence, on income derived from sources in Virginia and subject to Virginia taxation, the tax here shall be credited with such proportion of the tax payable to the other State as the income from Virginia sources bears to the entire income. This section is subject to the same proviso as is Section 39 as to like provision for credit by such other State.

These two sections 39 and 40 are often referred to as the Comity sections. The New York law contains similar provisions and thus they operate as between Virginia and New York taxes where applicable.

[fol. 10] The provisions of these sections 38, 39 and 40 clearly show the intent and purpose to avoid double State taxation on the same income. Further than this, Section

25 of the Tax Code shows the same plan and purpose. Under sub-sections k and l the tax payer is allowed a deduction of "dividends on Stock of National Banks and local Banks and Trust Companies" and dividends from corporations whose income was assessable in Virginia, or a proportionate part if only part of such income is so assessable in Virginia. The purpose of these is obviously to prevent double state taxation of the same income.

(2) Income Tax on Corporations and Partnerships

This is the second classification for income tax purposes, and is covered by Sections 52-67, inclusive, of the Tax Code.

Though corporations are generally regarded as the "step-children" of taxation, the same plan of avoiding double state taxation is shown in the law as applicable to them.

Section 52 provides for income tax on Domestic Corporations and that it shall be only on income "from business done or property located, or sources *in this state*,"—clearly a provision to avoid taxation on income subject to taxation in other states.

Section 54 further carries out the same purpose in providing that where the business of a corporation is conducted partly within and partly without the State, the tax shall be on income derived "from sales wherever made of goods, wares and merchandise *manufactured or which originated in this State* or from other business done or property located *within this State.*"

As to Partnerships, the method is directly contrary to that applied to Corporations and to Estates and Trusts, in that the partnership simply makes a return showing the distributable share of income to the respective partners and the latter pay their income taxes personally. There, also, the general idea and plan to avoid double State taxation on the same income is evident in that no tax assessed against the partnership because it is assessed against the individual partners.

It is submitted that the above shows the carefully considered plan of income taxation to avoid assessment of two state income taxes on the same subjects, whether such assessment be by one or more states, and that the assessment here violates this general idea and plan, so plainly evidenced.

It is noted that under the contention of the Common-[fol. 11] wealth, with statutes similar to that of Virginia and New York, the identical income paid to a beneficiary of a discretionary trust, whenever the beneficiary be a resident of a state different from that of the trust would be subjected to a double state tax on the income, i. e. the trust pays one tax and the beneficiary pays the other. In no case would the income due or paid from a trust to a direct and ordinary beneficiary be so subjected. In this case the trust as such pays no income tax, and each beneficiary pays the tax on his own trust income, in the State of his residence. If the question of "income earned in the state of the residence of the beneficiary" is involved proper credit is provided for.

Surely there is no basis for, and as shown above no intention to discriminate there against beneficiaries of a discretionary trust and subject the income paid to them to double taxation when such is specifically and carefully guarded against as to the income from trusts paid to ordinary beneficiaries. Such a construction would create an unequal, unfair, and discriminatory burden on discretionary trust income.

It is pertinent to ask—What possible reason in equity and fairness could there be for such discrimination?

Constitutionality

That construction must be adopted, where possible, to avoid a conflict with the Constitution.

Smith v. Commonwealth, 75 Va. 904, 907.

Virginia, etc. Coal Co. v. McClelland, 98 Va. 424, 36 S. E. 479.

Where a statute is susceptible of two constructions, one within and one without the legislative powers, the Court must adopt the former.

Martin v. So. Salem Land Co., 97 Va. 349, 33 S. E. 600.

Harrison v. Thomas, 103 Va. 333, 336, 49 S. E. 495.

Louisville, etc. R. Co. v. Interstate R. Co., 108 Va. 502, 63 S. E. 369.

Tobacco Growers Asso. v. Danville Warehouse Co., 144 Va. 452, 132 S. E. 482.

This principle is carried specifically into the Tax Code (Sec. 2) as follows:

[fol. 12] "The provisions of the Tax Code of Virginia and all tax and income statutes shall always be so construed and so restricted in their application as not to conflict with any provisions of the Constitution of the United States or of the Commonwealth of Virginia, and as if the necessary limitations upon their interpretation had been expressed in each case."

As shown above, it was not the purpose of the State Legislature to subject income from a discretionary trust, or any trust, to double state taxation, that is, taxation in two states. As will be shown below, to hold otherwise would be to make the statute unconstitutional, and therefore the statute should be so construed as to avoid this result.

Contentions of Defendant and Opinion of Court

The contention of the State adopted by the lower Court was that the State of Virginia had the right to tax any income received by a resident, and that the Virginia statutes so provided. For this purpose, they cited Section 24 of the Tax Code defining gross income to include "gains or profits and income derived from estates or trusts by the beneficiary thereof." That section of the Code was, of course necessary, but was not intended to, and did not refer to the case of a beneficiary of a discretionary trust. Otherwise, to carry this contention to its logical conclusion, the Trustee under the specific provisions of the Statute would have to pay a tax on the income and then the beneficiary would have to pay an additional tax, though both the trust and beneficiary were in Virginia. It was necessary to put that provision in to provide for the case of ordinary beneficiaries whose income would have to include income from trusts, since the trustee would pay no tax on it.

The position was also taken by the Commonwealth and by the Judge, that the Virginia trust statute dealt only with resident trusts, and it thus had no reference or influence on the question of a non-resident trust. As pointed out, there is nothing in the statute which limits it to resident trusts or excludes non-resident trusts, and there is no reason why there should be. The purpose is very clear [fol. 13] that the income from a trust should be taxed only

once by a state. In the case of an ordinary Virginia trust with a non-resident beneficiary, Virginia would collect no tax because under the specific provisions of the statute, the trust pays no tax and the beneficiary would pay his tax where he resides under a similar provision that his income would include income from trusts. Similarly, in the case of an ordinary non-resident trust, the trust would pay no tax in that State and the beneficiary living in Virginia would pay his tax here. It would seem clear that the statute is carefully drawn to prevent double taxation from the same income from a trust, and there is no reason in justice or equity for discriminating against the beneficiary of a discretionary trust.

Much is made of the fact that the petitioner made her return to the United States Government, and in which she included this income. We submit that this is entirely immaterial and irrelevant. The question of double taxation does not apply as between the United States and a state, but only between two or more states. The Virginia income statutes could have no effect on the Federal income statutes. Under the Federal law an ordinary trust pays no income tax but the specific beneficiaries pay the tax on their respective income from the trust. In the case of discretionary trusts, the beneficiary pays the tax to the extent that it has been distributed to such beneficiary, while the Trustee pays the tax on income not distributed to the beneficiaries. Thus, a beneficiary of a discretionary trust is specifically required to pay tax on the income actually received during any year. The Virginia Tax Code naturally did not, and could not deal with Federal taxation, but did provide against double state taxation on the same income from trusts, as shown above.

There is now no question being raised against the contention that Mrs. Ryan received income from the trust estate. The contention is, first, that such income was not income taxable by the Virginia statutes, and, second, that any other construction would render the statute unconstitutional. The contention was made, and the opinion of the lower court stresses the fact that the State of Virginia had put no tax on the income against the trust, nor any interest in New York, but had simply taxed income of its own resident, and that the State had a right to do this, inasmuch as she receives the protection of the Virginia laws. The answer to this contention is set out above, namely, that the State of Virginia has carefully guarded against such taxation as is

[fol. 14] here made. It may be pertinent also to remark that the laws of the State of Virginia afford no protection to the petitioner so far as this income is concerned. If there were any question in regard to her rights to the income or the action of the trustees in regard thereto, she would have to go to New York, and the laws of New York would govern and control and offer the only protection that could be afforded.

The opinion of the Court, and the contention of the Commonwealth, undertook to draw a parallel between the case of corporate dividends, the income of the corporation being taxed in the state of its domicile, and the dividends being taxable to the stockholders in another state. The parallel is most inapt for the following reasons:

(1) A corporation is an entire and separate entity from a stockholder, it owns its assets and the income and can use the income as it sees fit for general expenses, expansion, advertisement, or such other purposes, and only transfer to the stockholders so much of the income or surplus as the corporation may think wise. The stockholder has no right to dictate or direct the use of the income of the corporation, except in case of gross disregard of the interests of the stockholders or illegal action by the corporation.

The case is very different with a trust. There the trustee simply holds the legal title. The property itself belongs to the beneficiaries who are the real owners. The trustee cannot use either principal or income for anything but specific trust purposes, and he must pay out the income, after deduction of necessary expenses, since it is owned by the beneficiaries, and the trustee can be required and forced to distribute. The trustee is a mere agent for the real beneficiaries, where the corporation is a separate and independent owner of its assets.

(2) As between a corporation and stockholders, the situation so far as income is concerned is very like that of two separate individuals, one of whom earns an income, a part of which he pays to a second for services or by way of interest for use of money, or otherwise, which of course is liable to the income tax. What the corporation pays out in dividends is in the nature of a contingent payment (dependent upon available earnings or surplus) for the use of the money of the stockholders, that is, the stockholder sells his money to the Corporation and the Corporation in considera-

tion thereof agrees that it will when conditions justify pay therefor in the way of dividends. The stockholders have sold and surrendered title to their money or assets, in con- [fol. 15] sideration of a pro rata part, as the Corporation may feel proper to pay out in dividends. It is quite a different situation from a trustee and beneficiary, where the principal assets are delivered to the trustee simply for handling as agent of and for the benefit of the beneficiaries.

(3) One dealing with a corporation deals with a corporation as such and in making payments to the corporation has no concern with what becomes of the money. In dealing with a trustee, however, every one is required to see to the proper application of the money paid, unless specifically excused by the trust instrument.

It is submitted that the parallel is not apt and has no bearing on the question before the Court.

Second. The Assessment Here if Justified under the Virginia Law Would be Contrary to the Provisions of the Fourteenth Amendment to the Federal Constitution

The Fourteenth Amendment is what is usually referred to as the Due Process Clause. This point depends upon Federal decisions and the situs of the income for taxation purposes.

It is submitted that the holdings of the United States Supreme Court are clear on this point, and are the result of a gradual and increasing tendency of the Court towards the view that double taxation by one or more states on the same subject matter is contrary to the protection afforded by the Fourteenth Amendment.

Two very recent U. S. Supreme Court cases, Senior v. Braden, 295 U. S. 422, 79 L. Ed. 1520, and New York ex Rel Cohn v. Graves, March 1, 1937, Adv. Ops. (No. 9), 81 L. Ed. p. 409, are to our mind conclusive on the question. In the case of Senior v. Braden, decided May 20, 1935, a resident of Ohio owned transferable certificates showing that he was a beneficiary under seven separate declarations of trust, and as such entitled to stated portions of rents from the properties, some in and some out of Ohio. During 1931, he received $2,231.29 from the rents (income) from the properties. The question was as to the right of the State of Ohio to assess and collect a tax of 5 per cent on the income there-

from under its statutes. The various parcels of land had been assessed for customary taxes in the name of the legal owner or lessee according to local law.

[fol. 16] The lower court upheld the tax in this case and argued that the certificates show an interest in the beneficiary and were a "species of intangible personal property consisting of a bundle of equitable choses in action because the provisions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts," and that the tax of 5 per cent on the income was a mere basis for the tax on the property itself.

In reversing the case, the Court refers to the case of Maguire v. Trefry, in which it had upheld an income tax of another state against a beneficiary living there, on income received from a foreign trust, to the extent to which the income had not been taxed by the home state of the trust, and then proceeds as follows:

"Maguire v. Trefry, 253 U. S. 12, 64 L. ed. 739, 40 S. Ct. 417, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personalty) from which the income arose were held in trust at Philadelphia; income from securities *taxable directly to the trustee was not within the statute.* The opinion accepted and followed the doctrine of Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277, and Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, 38 S. Ct. 40, L. R. A. 1918C, 124. Those cases were disapproved by Farmers Loan & T. Co. v. Minnesota, 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98, 65 A. L. R. 1000. They are not in harmony with Safe Deposit & T. Co. v. Virginia, 280 U. S. 83, 74 L. ed. 180, 50 S. Ct. 59, 67 A. L. R. 386, and views now accepted here in respect to double taxation. See Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436, 72 A. L. R. 1303; Beidler v. South Carolina Tax Commission, 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54; First Nat. Bank v. Maine, 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174, 77 A. L. R. 1401."

As stated in the Maguire v. Trefry case, the tax had been assessed against a local beneficiary of a foreign trust and the holding was simply that the tax was valid to the extent

[fol. 17] that such income had not been taxed directly to the Trustees. It will be observed that the instant case is stronger, since here the whole income from the trust has already been taxed in New York against the Trustees.

The necessary result of the repudiation by the Court of the decision in Maguire v. Trefry and the statement by the Court that it is contrary to *"views now accepted here in respect to double taxation"* is that the Court specifically holds that income received by a resident beneficiary from a foreign trust is not subject to taxation by the home state of the beneficiary, even though that income had not been taxed by the state of the foreign trust. This is likewise a holding that the situs of the income from a trust is in the state of the trust and only in that state, and that such income therefore cannot be taxed by any other state.

That this is the effect of the decision is very clearly shown in the dissenting opinion filed by Mr. Justice Stone in Senior v. Braden, where, after referring to the obligation to pay taxes arising from the unilateral action of the government, and to distribute the burden among those who bear it, and the right to assess such taxes, he states as follows:

"For centuries no principle of law has won more ready or universal acceptance. Even now that it is doubted, the doubt is rested on no more substantial foundation than want of 'jurisdiction' to tax and the assertion that the Fourteenth Amendment is endowed with a newly discovered efficacy to forbid 'double taxation' when the sovereignty imposing the tax is that of two or more states. See Farmers Loan & T. Co. v. Minnesota, 280 U. S. 204, 210, 74 L. ed. 371, 374, 50 S. Ct. 98, 65 A. L. R. 1000: Safe Deposit & T. Co. v. Virginia, 280 U. S. 83, 92, 74 L. ed. 180, 183, 50 S. Ct. 59, 67 A. L. R. 386; Baldwin v. Missouri, 281 U. S. 586, 593, 74 L. ed. 1056, 1060, 50 S. Ct. 436, 72 A. L. R. 1303; compare Burnet v. Brooks, 288 U. S. 378, 400, et seq., 77 L. ed. 844, 854, 53 S. Ct. 457, 86 A. L. R. 747."

Further in the dissenting opinion Mr. Justice Stone refers to the fact that "it is now thought by the Court to be neces-
[fol. 18] sary to discredit or overrule Maguire v. Trefry, 253 U. S. 12, 64 L. ed. 739, 40 S. Ct. 417, supra, in order to overturn the tax imposed here * * *."

The fact that there was a dissenting opinion shows that the matter was thoroughly argued out by the Court among

themselves and that the holding in Maguire v. Trefry was in fact overruled, and deliberately overruled, and the Court has thus specifically and definitely held that the Fourteenth Amendment to the Constitution of the United States protects the citizens against double taxation by one or more states on the same subject of taxation.

In New York ex rel. Cohn vs. Graves (March 1, 1937), supra, the actual question involved the right of a state to tax a resident on income from bonds which were physically located in another state, secured by mortgage in such other state, and on income (rents) from real estate located in such other state.

The Court upheld the tax on the basis that the property and the income therefrom were separate and independent subjects of taxation and there was no double taxation where neither state undertakes to tax both. The opinion by Stone, J., says:

"The imposition of these different taxes by the same or different states upon the distinct and separable taxable interests, is not subject to the objection of double taxation *which has been successfully argued in those cases where two or more states have laid the same tax* upon the same property interest in intangibles or upon its transfer at death." Cases cited.

And again:

"But, as we have seen, it does not follow that a tax on land and a tax on income derived from it are identical in their incidence or rest upon the *same basis of taxing power, which are controlling factors in determining whether either tax infringes due process.*"

We submit that the above shows that the U. S. Supreme Court has expressly and plainly taken and stated the view that the same subject matter cannot be taxed by two or more [fol. 19] states under the due process clause. Clearly New York had the right to tax the income on the New York trust the assets of which were all kept, held and administered in New York, and the income being taxed there, it could not be taxed in Virginia without violating the "views now accepted here in respect to double taxation."

It is admitted that tax had now been assessed by both New York and Virginia on the identical "Income" received

by Mrs. Ryan. There has been admitted and obvious "double taxation" on the same subject matter by two states.

As stated above, this holding of the Court is not a sudden action, but is a view which has been entertained by the Court for some years back, as evidenced by its decisions beginning with the case of Safe Deposit & Trust Company v. Virginia, 280 U. S. 83, 74 L. ed. 180, 67 A. L. R. 387. In this case the question was as to the right of the State of Virginia to tax to resident beneficiaries assets in a foreign trust (created by a resident of Virginia). Under the trust the principal and income accumulating was held by the Trustees until the beneficiaries should respectively reach twenty-five years of age and then to be paid over. The Court refers to the fact that "* * * Nobody within Virginia has a present right to their (the assets) control or to receive income therefrom, or to cause them to be brought physically within her borders."

The principle modilia sequunter personam was claimed by State to authorize the taxation in Virginia as giving a legal situs in Virginia for taxation.

The Supreme Court in refusing to apply the principle, said that it was ordinarily a general rule to be applied, but added:

"But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if to do so would result in inescapable and *patent injustice whether through double taxation or otherwise*," and

"A statute of a State which undertakes to tax things wholly beyond their jurisdiction or control conflicts with the 14th Amendment."

The Court then decides that:

[fol. 20] "Here we must decide whether intangibles—stocks and bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner may be taxed at the latter's domicile in another State. We think not. The reason which led this Court in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Conn. Cas. 493, and Frick v. Pennsylvania, supra, to deny the application of the maxim mobilia sequunter personam to tangi-

bles applies to intangibles in appellant's possession. They have acquired a situs separate from the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation; both unjust and oppressive. The principle mobilia sequunter personam 'was intended for convenience, and not to be controlling where justice does not demand it.' "

Attached to the report of the Safe Deposit & Trust Co. case in 67 A. L. R. is an extended note in which the author refers to the fact that the effect of the decision is to override not only the particular case considered by the holding in a number of other Virginia cases, viz.: Seldon v. Brooke, 104 Va. 832, Brooklyn Trust Co. v. Booker, 122 Va. 680, and Wise v. Comm., 122 Va. 693.

The Safe Deposit case deals with the corpus of the trust fund and not with income but it is cited and discussed to show the principles involved—viz. that the Court will disregard ordinarily accepted principles and apply the protection of the Due Process Clause to prevent double taxation and injustice.

For this reason, in the Frick case, supra, it refused to apply the mobilia sequunter personam rule to tangibles and in the Safe Deposit case, it refused to apply it to intangibles.

Why should there be any difference to the application of the Fourteenth Amendment to prevent double taxation on tangibles and intangibles than in its application to prevent double taxation on income? Is the citizen any more hurt by double taxation on one than on the other?

The whole amount on which the tax in question is placed is the same collected by the New York Trustees, accounted [fol. 21] for there, and tax paid on it there. The situs of such "Income for tax purpose was in New York. It is admitted that the New York Trustees have paid the full state income tax on all of the income in New York. It would seem clear from the decisions of the U. S. Supreme Court that the Fourteenth Amendment protects a citizen against double taxation by one or more states on the same subject. There can be no question but that the tax assessed here is in fact a second taxation on the same fund (trust income), which has already been taxed by the State of New York. Such a tax would, therefore, be contrary to the principles accepted by the United States Supreme Court in the

cases above cited, as well as in the cases cited below. The State of Virginia could levy a tax against the Trustees on income derived from Virginia sources. However, it is not shown, and in fact there is no income derived from Virginia sources involved in this case, with the exception possibly of income received by the Trustees from Virginia corporations, and which under the Virginia law is deductable, and proper deduction has been made, as shown in the agreed statement of facts. Sections 4 and 5 deal with deductions provided for in Section 25 of the Virginia Tax Code. The tax here is clearly a tax against a beneficiary with respect to alleged income, upon which the Trustees have already been fully taxed in New York.

The decisions cited above show the views of the U. S. Supreme Court, with reference to double taxation, and this tendency is progressively shown by other decisions, as follows:

In Farmers Loan & Trust v. Minn. 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371, the Court again cuts away double taxation in holding that the Fourteenth Amendment prohibited the assessment of an inheritance tax by the State of Minnesota on bonds of residents and *and* corporations of Minnesota, and to accomplish this and protect against double state taxation expressly overrules the case of Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277, under which for years such double assessment had been permitted.

In First National Bank of Boston v. Maine, 284 U. S. 312, 52 Sup. Ct. 174, 76 L. ed. 313, the same rule was applied to prevent double state inheritance taxation (by two states) on stock in domestic corporations, owned by a non-resident decedent. The Court refers to the Farmers Loan & Trust Company case of which it said:

[fol. 22] "The view that two states have power to tax the same, transfer on different and inconsistent principles was distinctly rejected. * * *."

The Court then quotes the conclusion of the Farmers Loan & Trust Co., case, as follows:

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive con-

sequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The last quotation might well apply to the case at bar. The subjects are different but the same principles operate with equal force on income, as on tangibles and intangibles.

For other cases applying the same principles to other subjects see Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436, 74 A. L. R. 1303, and Bender v. S. C. Tax Com.; 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54.

The same principle of the protecting power of the Fourteenth Amendment to prevent double state taxation on the same subject is illustrated in Burnet v. Brooks, 228 U. S. 378, 77 L. ed. 845. The opinion by Chief Justice Hughes at page 855, states:

"It was this '*rule of immunity* from taxation by more than one state', deducible from the decisions in respect of various kinds of property that the Court applied in First National Bank v. Maine, supra."

It is respectfully submitted that to sustain the contention [fol. 23] of the State in the instant case that the tax was properly assessed against petitioner here, would not only do violence to the Virginia statutes, disregarding the classifications and the provisions of the statutes with reference to tax on trusts, but would render the statute unconstitutional to this extent, and would do violence to the principles above set out, that a statute must be construed, if possible, to render it constitutional; and to give such construction would in fact render the statute unconstitutional under the clear holdings of the United States Supreme Court, as set out in the above decisions.

Petitioner therefore prays that a writ of error and supersedeas be awarded to the said judgment of the Circuit Court of Nelson County, and that said judgment be reversed, and that an order be entered in this Court directing that the

amount paid by petitioner on income taxes, viz: $8,996.46, for the years 1931, 1932, and 1933, be refunded to petitioner, or her attorneys of record.

The attorneys for petitioner desire to state orally the reasons why the writ of error and supersedeas should be granted, and in the event that the same is granted, this petition will be used as the opening brief.

A copy of this petition was, pursuant to Rule II of this Court, as amended, mailed to Henry R. Miller, Jr., attorney for the Commonwealth, on the 30th day of April, 1937.

Respectfully submitted, Caskie & Frost, Attorneys for Mary T. Ryan, by Jas. R. Caskie.

The undersigned attorneys practicing in the Supreme Court of Appeals of Virginia, certify that in our opinion the judgment complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of the State of Virginia.

Respectfully, Jas. R. Caskie, E. M. Frost.

ORDER GRANTING WRIT

Writ of error and supersedeas granted. Bond $300.00.

H. B. Gregory.

5 12-37.

[fol. 24] IN CIRCUIT COURT OF NELSON COUNTY

PETITION

To the Honorable Edward Meeks, Judge of the Circuit Court for the County of Nelson, Virginia:

Your petitioner, Mary T. Ryan, a resident of the State of Virginia, would respectfully show that she is aggrieved by taxes on alleged income assessed against your petitioner by the Department of Taxation of the State of Virginia, on October 24, 1934, in the sum of $8,996.46, as follows:

Tax Year	Page and Line	Subject of Taxation	Values	Taxes Assessed	Total Amount Due
1931	43–1	Income	68,348	2,050.44	
1932	43–1	Income	92,901	2,787.03	
1933	43–1	Income	138,633	4,158.99	8,996.46

Your petitioner would further show that the said erroneous assessment was not caused by the wilful failure or refusal of petitioner to furnish a list of her property and income to the tax assessing authorities, as the law requires.

Your petitioner would further show that the amounts for the respective years, as set out above, and on which the taxes were assessed, were sums paid to your petitioner by the Trustees under the will of Thomas F. Ryan, a resident of the State of New York, who died on November 23, 1928. Under the will of the said Thomas F. Ryan, the estate was divided into fifty-four equal parts, and Clendennin J. Ryan, a resident of New York, and Guaranty Trust Company, a corporation of the State of New York, were appointed as trustees for the estate, and have been conducting the trust since that time. The said will was probated in the State of New York and the Trustees qualified in said state. The said Trustees took over the estate and have been handling and controlling the same under the laws of the State of New York, where all the assets in the hands of the Trustees are kept, and the management, accountability, and control of the said trust is vested in and exercised by the Courts of the State of New York, and the accounts of the Trustees are settled there. The said Trustees pay to the State of New York the income tax on the total income from the assets in their hands and distribute the remainder to the parties entitled. The provision of the will of the said Thomas F. Ryan under which the sums were so paid to your petitioner by the Trustees, is as follows:

"Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over [fol. 25] such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life in such installments and at such intervals as they in their sole discretion may determine," (Article Fourth, sub-division F, of the said will.)

The said will further provides that the said Trustees should "divide any surplus income from said twelve parts not paid to my wife as aforesaid, into forty-two equal portions, and to pay such surplus income in equal quarterly payments as near as may be" to certain distributees as designated in said will, and that upon the death of the

said wife the principal amount of the said twelve equal parts should be divided and distributed to certain designated distributees, as set out in said will.

The said will was subsequently, on, to-wit, August 24, 1929, probated in the Circuit Court for Nelson County, Virginia, in which County the said Thomas F. Ryan owned certain real estate. No part of the income received by the Trustees is from any property located or kept within the State of Virginia.

Your petitioner is further advised and insists that the sums so taxed as above were not properly classed as income to petitioner, nor subject to taxation as such under the laws of the State of Virginia; that there was no authority under the laws of Virginia for such assessment in Virginia; that the so called income is exempt and excluded from taxation under such laws; that the said assessments were not made within the time provided by law; that the said assessments constitute a double assessment of tax; that the law under which said assessments are made is unconstitutional in that it operates to deprive the petitioner of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; and that the said assessments and tax are otherwise illegal and erroneous.

Your petitioner would further show that the amount of said tax, to-wit, $8,996.46, has been paid to the Treasurer of Virginia, but under protest.

Petitioner attaches hereto the pertinent section of the New York tax law, that being Section 365 of said law, under which the income of the whole trust estate is taxed in that State.

Petitioner therefore prays that the said tax so erroneously assessed may be declared invalid and void, and that the petitioner may be exonerated from payment of same, and that order may be entered directing repayment [fol. 26] to your petitioner of the amount so paid, pursuant to the provisions of Section 410 of the Tax Code of Virginia. And your petitioner will ever pray, etc.

Mary T. Ryan, by Counsel; Caskie & Frost, Attorneys for Petitioner.

Exhibit to Petition

Section 365, New York Tax Law

"Estates and trusts.—1. The tax imposed by this article shall apply to estates and trusts, which tax shall be levied, collected and paid annually upon and with respect to the income of estates or of any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate;

b. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

c. Income held for future distribution under the terms of the will or trust;

d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct; and

e. Income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which the tax is to be paid by the fiduciary."

"3. In cases under paragraphs a, b, and c of subdivision one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred and sixty-two, and in such cases an estate or trust created by a person not a resident and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than resi- [fol. 27] dents are liable under section three hundred and fifty-nine, subdivision three.

4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of income is in the dis-

cretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credit to any such beneficiary. In all other cases under paragraphs d and e of subdivision one of this section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary not a resident, derived through such estate or trust, shall be taxable only to the extent provided in section three hundred and fifty-nine, subdivision three, for individuals other than residents."

IN CIRCUIT COURT OF NELSON COUNTY

MARY T. RYAN, Petitioner,

vs.

THE COMMONWEALTH OF VIRGINIA, Respondent

ANSWER OF COMMONWEALTH OF VIRGINIA.

This respondent, the Commonwealth of Virginia, by the [fol. 28] Attorney General of Virginia, for answer to the petition of Mary T. Ryan against the said Commonwealth of Virginia, answering says:

1. That the petitioner, Mary T. Ryan, is now and has been for a number of years, particularly throughout the calendar years 1930, 1931, and 1932 and on December 31st of each of said years, a legal resident of and domiciled in Virginia, and has maintained her usual place of abode in Virginia throughout all of said years;

2. That she has regularly and voluntarily filed with the Commissioner of the Revenue for the County of Nelson, Vir-

ginia, her individual State income tax returns of income received by her during the calendar years 1930, 1931 and 1932, showing therein a net taxable income running into the 3% bracket for computing the tax thereon for each year, but did not include in her taxable income so reported in such returns the amounts received by her from the so called "Mary T. Ryan Trust," which was the Trust set up under the will of Thomas F. Ryan, as alleged in the petition herein;

3. That in the regular course of the audit of the returns by the Department of Taxation, it was ascertained that this petitioner received in the calendar years 1930, 1931 and 1932, from the said "Mary T. Ryan Trust" additional sums which under the statutes of Virginia were from taxable sources and which constituted net taxable income to her in addition to the net taxable income reported in the returns filed by her, which sums of additional net taxable income were in the amounts set out below, and the Department of Taxation on October 24, 1934, thereupon assessed her with additional State income taxes in the amounts and for the tax years, as follows, namely:

Years in Which Income Received	Tax Year	Additional Net Taxable Income	Amount of Taxes
1930	1931	$ 68,348.00	$2,050.44
1931	1932	92,901.00	2,787.03
1932	1933	138,633.00	4,158.99
Total Tax			$8,996.46

all of which said tax amounting to $8,996.46 was fully paid to the Treasurer of Virginia on the 12th of December, 1934, but this respondent admits that said payment was made under protest;

4. That this respondent admits that said assessment was not caused by the wilful failure or refusal of this petitioner [fol. 29] to furnish a list of her property or income to the tax assessing authorities, as the law requires;

5. That your respondent is advised and believes and therefore alleges that the said petitioner filed with the United States Government her federal income tax returns

and included therein as a part of her net taxable income the full amounts of income constituting the bases of these assessments of State income taxes and that the federal income taxes have been paid thereon without protest and without any application having as yet been made for a correction of said federal income taxes;

6. That this respondent is advised and therefore alleges that the entire amount of tax has been lawfully and correctly assessed and has been correctly paid and that the petitioner is not entitles to a refund of any portion thereof;

7. That your respondent admits all statements of fact that are made in the petition herein, but denies all expressions of opinion and conclusions of law, especially those found in the last paragraph beginning on page two (2) of the petition and further alleges that the section of the New York tax law, as set out in the copy of said law attached to said petition, is irrelevant to the issues herein.

And having fully answered, this respondent prays to be hence dismissed.

Abram P. Staples, Attorney General; W. W. Martin, Assistant Attorney General; Henry R. Miller, Jr., Attorneys for Respondent.

IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

ORDER DOCKETING CASE—July 22, 1935

[fol. 30] This day came Mary T. Ryan, by counsel, and presented her notice and petition for correction of alleged erroneous assessment of income tax by the State Department of Taxation. And it appearing to the Court that a copy of said notice and petition were served on C. H. Morrissett, more than ten days prior hereto and that the said notice and petition were filed in the Clerk's Office of this Court on the 10th day of July, 1935, it is ordered that this matter be placed on the docket of the Court and set for hearing.

IN CIRCUIT COURT OF NELSON COUNTY.

[Title omitted]

STIPULATION OF FACTS

"It is hereby stipulated and agreed between the parties by their respective attorneys that the following are all of the facts and exhibits herein, which facts and exhibits are to be taken and considered by the Court as if the facts had been properly testified to in open court and said exhibits had been properly introduced and proven in open court:

1. That the petitioner, Mary T. Ryan, is now and has been for a number of years, particularly throughout the calendar years 1930, 1931 and 1932 and on December 31st of each of said years, a legal resident of and domiciled in Virginia, and has maintained her usual place of abode in Virginia throughout all of said years;

2. That she has regularly and voluntarily filed with the Commissioner of the Revenue for the County of Nelson, Virginia, her individual State income tax returns of income received by her during the calendar years 1930, 1931 and 1932, showing therein a net taxable income running into the 3% bracket for computing the tax thereon for each year, but did not include in her taxable income so reported in such returns the amounts received by her from the so called "Mary T. Ryan Trust," which was the Trust set up under the will of Thomas F. Ryan.

3. That in the regular course of the audit of the returns [fol. 31] by the Department of Taxation, it was ascertained that this petitioner received in the calendar years 1930, 1931 and 1932, from the said "Mary T. Ryan Trust" additional sums which were in the amounts set out below, and the Department of Taxation on October 24, 1934, thereupon assessed her with additional State income taxes in the amounts and for the tax years as follows, namely:

Years in Which Income Received	Tax Year	Additional Net Taxable Income	Amount of Taxes
1930	1931	$ 68,348.00	$2,050.55
1931	1932	92,901.00	2,787.03
1932	1933	138,633.00	4,158.99
		$299,882.00	
Total Tax			$8,996.57

all of which said tax amounting to $8,996.46 was fully paid under protest to the Treasurer of Virginia on the 12th day of December, 1934.

4. That the amounts so paid to the said Mary T. Ryan, upon which said $8,996.46 of taxes were assessed, represent the net amount of interest from taxable bonds and notes and the net amount of dividends from corporations whose dividends are normally subject to the Virginia income tax when received directly by a resident of Virginia, after deduction of the commissions paid to the Trustees of said Mary T. Ryan Trust, and deduction of such proportion of the dividends as may be deductible by virtue of subsection (1) of Section 25 of the Tax Code of Virginia, which is as follows:

Section 25. Deductions allowed.—Taxpayers reporting income as prescribed by this chapter shall be allowed the following deductions:

"(1) Dividends received during the taxable year from stock in any corporation, the income of which was assessable for the preceding year under the provisions of the income tax laws of this state; provided that when only a part of the income of any such corporation was so assessable, only a corresponding part of the dividends received therefrom shall be deductible."

5. That said assessment was not caused by the wilful failure or refusal of this petitioner to furnish a list of her property or income to the tax assessing authorities, as the law requires;

[fol. 32] 6. That the said Mary T. Ryan filed with the United States Government her Federal income tax returns and included therein as a part of her net taxable income the full amounts of the payments made to her and constituting the bases of these assessments of State income taxes, and the Federal income taxes have been paid thereon without protest and without any application having been made by the said Mary T. Ryan for a correction of such Federal income taxes.

7. That the Trustees under the will of Thomas F. Ryan regularly made their Federal income tax returns and deducted in such Federal fiduciary returns the entire amounts of payments made to the said Mary T. Ryan, leaving it to

the said Mary T. Ryan to report such payments to her to the Federal Government in her individual Federal income tax returns.

8. That the amounts so paid to the said Mary T. Ryan and upon which the State income taxes were assessed herein were sums paid to her by the Trustees under the Will of Thomas F. Ryan, a resident of the State of New York who died on November 23, 1928, a copy of which Will is hereto attached and marked Exhibit A, and is to be taken and considered as an exhibit properly testified to and proven in this cause. Under the Will of the said Thomas F. Ryan the estate was divided into fifty-four equal parts and Clendennin J. Ryan, a resident of New York, and Guaranty Trust Company, a corporation of the State of New York, were appointed as Trustees for the estate, and have been conducting the Trust since that time. The said Will was probated in the State of New York and the Trustees qualified in said State. The said Trustees took over the estate and have been handling and controlling the same under the laws of the State of New York, where all the assets in the hands of the Trustees are kept, and the management, accountability, and control of the said Trust is vested in and exercised by the courts of the State of New York, and the accounts of the Trustees are settled there. The said Trustees pay and have paid for each of the tax years in question to the State of New York the income tax on the total income from the assets in their hands and distribute the remainder to the parties entitled. The provision of the Will of the said Thomas F. Ryan under which the sums were so paid to your petitioner by the Trustees, is as follows:

"Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their [fol. 33] sole discretion may determine." Article Fourth, sub-division F. of said Will.)

The said Will further provides that the said Trustees should "divide any surplus income from said twelve parts not paid to my wife as aforesaid, into forty-two equal portions, and to pay such surplus income in equal quarterly payments as near as may be" to certain distributees as

designated in said Will, and that upon the death of the said wife the principal amount of the said twelve equal parts should be divided and distributed to certain designated distributees, as set out in said will.

The said Will was subsequently, on, to-wit, August 24, 1929, probated in the Circuit Court for Nelson County, Virginia, in which County the said Thomas F. Ryan owned certain real estate. No part of the income received by the Trustees is from any property located or kept within the State of Virginia.

9. That the attached Exhibit B is a true copy of Section 365 of the New York Income Tax Law, under which law the income of the whole trust estate is taxed in New York State, and which exhibit is to be taken and considered by this court as sufficient proof of the existence of Section 365 of the New York Income Tax Law.

10. That Exhibits C, D and E attached hereto are true copies of the income tax returns and schedules attached thereto filed by the said Mary T. Ryan with the Commissioner of the Revenue for the County of Nelson, showing a report of her income received by her in the calendar years 1930, 1931 and 1932, respectively, and are to be taken and considered by the court as if the originals thereof had been properly testified to and introduced in open court.

This Stipulation is not to be taken as admitting any conclusions of law set out in either the application and petition of Mary T. Ryan, or in the answer of the Commonwealth of Virginia, and is made without prejudice to the right of either party to make proper exceptions on the ground of relevancy or materiality of any of the stipulated facts, and each party shall have a right to make such objections on such grounds as they may be advised, as to relevancy or materiality of any such facts.

Caskie & Frost, Attorneys for Petitioner. Abram P. Staples, Attorney General; W. W. Martin, Assistant Attorney General; Henry R. Miller, Jr., Attorneys for Respondent.

[fol. 34] Exhibit "B" to stipulation omitted. Printed side page 26, ante.

[fol. 35] IN CIRCUIT COURT OF NELSON COUNTY

MARY T. RYAN, Plaintiff,

v.

COMMONWEALTH OF VIRGINIA, Defendant

JUDGMENT—November 9, 1936

On the ninth day of April, 1936, came the petitioner, by her attorney, and also the defendant by its attorney, and by agreement of counsel this application came on to be [fol. 36] heard upon the petition filed herein, the stipulation of facts entered into by the parties which stipulation is made a part of the record herein, the oral arguments of counsel and briefs filed herein, whereupon consideration of all of which the court is of opinion, as expressed in its written opinion filed herein, that the petitioner is not entitled to the relief prayed for in her petition, and it is ordered by the court that the application of the petition for relief against the income tax assessments involved in these proceedings be, and the same is hereby denied and the petition dismissed, and that the defendant recover of the petitioner its costs in this behalf expended.

To which order of the court petitioner, by counsel, excepted and prayed that her exception be noted of record, which is accordingly done.

The petitioner, by counsel, indicating an intent to apply to the Supreme Court of Appeals of Virginia for a writ of error, it is ordered that the execution of this order be suspended for ninety days from date.

Clerk's certificate to foregoing transcript omitted in printing.

IN CIRCUIT COURT OF NELSON COUNTY

MARY T. RYAN, Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, Petitionee

Decision

OPINION

[fol. 37] On Nov. 23rd, 1928, Thos. F. Ryan, a resident of the State of New York, died leaving a will, under the terms of which the petitioner, Mrs. Mary T. Ryan, his widow, received, from the designated representatives of his Estate, the sum of $68,348.00 in 1931, on which Virginia asserted a tax of $2,050.55, the sum of $92,901.00 in 1932, on which Virginia asserted a tax of $2,787.03, and the sum of $138,633.00 in 1933, on which Virginia asserted a tax of $4,158.99, making a total tax of $8,996.57, which has been paid under protest, on total payments of $299,882.00. The Petitioner is seeking recovery of the tax paid by her on account of the monies paid to her from the Estate-Trust of her deceased husband.

Issue on the Proposition: Can the State of Virginia levy, assess, and collect income tax on beneficial payments from an Estate in another State, after received in former State, although income tax was assessed and paid on the entire income of said Estate, including payments to petitioner, in the latter State?

The petitioner contends the tax of Virginia by way of income is illegal and void because:

First. The assessment was not made in time prescribed;

Second. The amounts received by her were in lieu of Dower, she was a purchaser thereof for value, or stood in the position of an annuitant;

Third. The amounts received were not income as such taxable under the law of Virginia; and,

Fourth. The Virginia law under which the tax is imposed is null, void, and unconstitutional, as constituting "double taxation."

The grounds "first" and "second" have been abandoned and authorized to be disregarded and hence will not be considered, leaving only "third" and "fourth," which will be dealt with in order named. Petitioners' Brief—page 14 —and Letter dated April 24th, 1936.

Third. The amounts received were not income as such taxable under the law of Virginia.

The law of Virginia concerning taxes on income is found in Chap. 6 of the Tax Code; embracing Sec. 23 to Sec. 67–, Incl. Much has been stated by the contending parties here as to the applicability of Secs. 50 and 51—pertaining to the income on Estates and Trusts. It would certainly seem that, considering the language of these Sections, the general purpose of a lawful tax and the inclination and presumption in favor of a valid and constitutional construction, rather than an invalid and unconstitutional one, together with the clear intention of the law making body, these Sections do not bear primarily upon or concern and determine [fol. 38] the tax involved here. The Estates and Trusts alluded to are those within the confines or jurisdictional boundaries of Virginia and the incomes derived here or such portions as are taxable commensurate with the Estates and Incomes here; the fiduciaries are directed in so far as they are within reach of the Statutes of this State; the estates and trusts in Virginia are touched even though created by a non-resident, or exist herein when owned by a non-resident. The situs of the property affected is the pole star, and the fact that this distinction is made sure in the law, but demonstrates that the Legislature was not attempting to go beyond its boundaries to lay a tax; in view of all law and reason, the law body of Virginia would not pretend to tax an Estate or a Trust in New York State, or to exercise control over its Fiduciaries, Trustees, Executors, etc. A reading of these Sections impresses this conclusion, and the fact that, as asserted in the beginning of Sec. 50, merely imposed an income tax as therein specified on estates and trusts within Virginia akin to the income tax imposed on individuals.

Virginia has not imposed any income tax on the Estate of Thos. F. Ryan in New York, nor on any Trust there by him created, nor on or against any Estate or Trust in the hands of his Trustees or Executors as has been done in New York under Sec. 365 of its Tax Code similar to our

Sec. 50; it has asserted that, under its laws, the monies paid to the petitioner, Mrs. Mary T. Ryan, beneficiary, in Virginia, by the representatives of said Estate or Trust therein created, are income in the hands of said beneficiary and subject to income tax in accordance with its Statutes. Virginia has an income tax law of broad extent and above referred to; in Sec. 24 of the Tax Code, so far as here necessary, defines gross income as follows: "The term 'gross income,' as used herein, included gains, profits * * *; * * * or gains or profits and *income derived from any source whatever;* including gains or profits and *income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares;* but * * * does not include the following items, which shall be exempt from taxation under this chapter: (c)—The value of property acquired by gift, bequest, devise or inheritance received during the year, *but the income received from such gifts, bequests, devises and inheritance shall be assessed under the provisions of this chapter.*" The succeeding Sections of the Tax Code prescribe the method for arriving at the "net income" to be taxed after certain deductions, which are concededly correct, or no question is raised in that respect for a failure to give proper credits and make proper deductions. Are these monies paid to and received [fol. 39] by the Petitioner in Virginia income and taxable as such? Under the will of the said Thos. F. Ryan, Article Fourth—F—creating the interest and generating the power by which the funds were brought into being—they are called income and directed to be paid as such; we read: "F. Twelve (12) of said equal parts to my said trustees in trust to receive the income therefrom and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support, and comfort during her life in such instalments and at such intervals as they also in their sole discretion may determine." Here is the source of the money and it is there directed and stated that the estate shall be set aside and the income therefrom paid as directed by those authorized. The Statute of Virginia referred to above (Sec. 24 of the Tax Code) states clearly that such sums derived from estates and trusts etc. by beneficiaries are income—taxable gross or net income; she had the power to so classify. A State has a right and power

to specify and classify property within its limits for taxation, so long as the classification is proper, reasonable, necessary, and not arbitrarily wrong, and that such classification is duly observed throughout the territory, producing equal and uniform taxation, and does not result in oppression and confiscation. See Carpel vs. Richmond—162 Va., p. 833—bearing on this and other vital points in this proceeding. Virginia has the right to make this classification of income for income taxation—nothing has been shown against it. The petitioner herself has classified the monies as income—she has received them under said will, from and on account of which she could only receive them, as income, and has returned them as income to the Federal Government as a basis for Federal income tax, paid that tax without protest, and is not seeking or asking its return.

Therefore, aside from mere terminology, it would seem that the funds received by the Petitioner, Mrs. Mary T. Ryan, for the years 1931, 1932, and 1933, assessed as a basis for the income tax here involved, are income, and that the law of Virginia is correct and within its scope and power to so designate and regard it as set apart for income taxation and subject to that tax when paid into the hands of the petitioner-beneficiary, a citizen and resident of its jurisdiction and domain.

Fourth. The Virginia law under which the tax is imposed is null, void, and unconstitutional, as constituting "double taxation."

The petitioner here claims that since the entire income from the Estate or Trust of the late Thos. F. Ryan has been [fol. 40] taxed and paid in the State of New York to the Trustees or the Estate, the law of Virginia, in so far as it taxes the funds paid to and received by her individually in Virginia as beneficiary under said will as aforesaid as income, transcends the Fourteenth Amendment to the Constitution of the United States ("Due Process Clause"), depriving her of her property without due process of law, constituting double taxation, and is null and void.

As hereinbefore stated, Virginia has not taxed any estate or trust in New York, nor any person or persons there holding the estate or trust, nor any interest in New York. It has stated that certain returns from estates or trusts shall be set apart and taxed as income. Mrs. Ryan, the petitioner,

for the years 1931, 1932, and 1933, was a resident citizen of Virginia, and received as such, income from the estate of her late husband, and paid into Virginia to her, sums aggregating $299,882.00, on which the income tax amounted to $8,996.57; she enjoys and receives the benefit from Virginia and her laws—their protection, comfort convenience, and all else they have to offer her as a citizen, and to her, as to all others so situated and receiving income or property, Virginia has the right, privilege, and power to tax in due accord, keeping and commensurate with the wealth and riches she possesses for the upkeep and maintenance of its government.

"The guaranty of the equal protection of the laws does not deprive the States of the power to adjust their systems of taxation in accordance with their own ideas of public policy"—Corpus Juris 12—p. 1151—Sec. 881.

"Each state, however, with regard to the taxation of property within its limits is sovereign and independent"—Corpus Juris 61—p. 141—Sec. 73.

"Double taxation means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the tax is laid, without taking all of it"—R. C. L. 26—p. 263.

There is not any "double taxation" here as within the meaning of the law and that phrase. This money taxed came right into the hand of Mrs. Ryan in Virginia and taxed only once to her as income, for one purpose under the law, for one tax period, and all similar property under the Statute was likewise taxed. See Peninsular Transit Corp. vs. Com'th.—165 Vs., p. 614—and especially at page 626—dealing with "double taxation" as defined in R. C. L. p. 263—Supra; also Hunton vs. Com'th.—183 S. E. p. 873 (S. E. Pamphlet No. 9—April 2nd, 1936)—holding that a tax on the dividends of railroad and electric power companies as [fol. 41] income is valid, although the corporations pay franchise and other state taxes. There is no more double taxation then is placed on the same property under various guise in Virginia, or as on dividends taxed as income to Virginia citizens on certain foreign corporations otherwise taxed in their jurisdictions, altogether recognized as legal and valid.

There are numerous authorities from the United States Supreme Court cited—notably:

Maguire vs. Trefy—253—U. S. p. 12;
Senior vs. Braden—295—U. S. p. 422;
Safe Deposit etc. vs. Com'th. of Va., 280—U. S., p. 83;
Frick vs. Penn.—268—U. S., p. 473;

Farmers Loan etc. vs. Minn.—280—U. S., p. 204; and others of the same tenor—the leading cases stressed are Maguire vs. Trefy and Senior vs. Braden—Supra. The former case held that income paid into Massachusetts from Pennsylvania under a Statute of the former State was taxable there, while the latter case, dealing with actual property interests held that the State of Ohio had no right or power to tax such interests beyond its jurisdiction along with similar interests within its limits, all the other authorities, including those cited and many others, follow the plan and well settled rule of law under the particular facts of each case, that no State can impose a tax on property beyond its territorial limits and beyond its power but within its boundary as to property having its situs there and being there as a matter of fact, the State is Supreme and can exercise its sovereign power to classify and to tax. As in the Maguire-Trefy Case, Virginia has a Statute and has a right to so tax thereunder and derive the benefit of the taxation for the support of its government, covering property as it comes within its jurisdictional and taxing powers.

In summary: The income tax law of Virginia is embraced in Chap. 6—of the Tax Code—containing the Sections 23-to-67—Incl., above mentioned; Sec. 24 defines "gross income," while Sections 25 and 26 provide for legal deductions, arriving at "net income" as given in Sec. 27—computed under Sec. 30; incomes are taxable only to the State (Sec. 35) and, after certain exemptions allowed, Sec. 38 states: "A tax is hereby annually levied for each taxable year upon *every resident individual* of this State, upon and with respect to his *entire net income* as herein defined for purposes of taxation" * * *, and then, after giving the rate and providing for certain taxes against non-residents, it concludes "* * * The taxes levied by this chapter shall be assessed, collected and paid as provided by law." It is [fol. 42] respectfully submitted that when Virginia so defined and classified what should be regarded as income

(embracing the monies taxed here as such), when they came into the hands and possession of its residents, living here, in Virginia, under its government, it was acting within the scope and power of its independent sovereign authority, under its law making body, and was not depriving its citizens or any citizen of the United States of his property without due process of law, or doing any act constituting "double taxation" contrary to the Fourteenth Amendment to the Federal Constitution, any tax imposed upon the property from which the monies or income came, in the hands of some other, in any personal of representative capacity, by another or foreign State (New York), notwithstanding.

Therefore, the sums received by the Petitioner, Mrs. Mary T. Ryan, were duly and properly classified and taxed as income, under a valid and constitutional statute not vitiated for "double taxation," nor doing violence to the Fourteenth Amendment of the Constitution of the United States. The tax is established as correct and legal, and the petition dismissed. Order will be entered when presented in accord with this opinion.

Respectfully, Edward Meeks, Judge.

Amherst, Virginia, Sept. 25, 1936.

A Copy. Teste.

H. H. Wayt, Clerk.

[fol. 43] In Supreme Court of Appeals of Virginia

Minute Entry—September 14, 1937

This cause, was this day partly heard upon the transcript of the record of the order aforesaid and arguments of counsel, and continued until tomorrow morning for a further hearing.

Minute Entry—September 15, 1937

This cause, was this day fully heard upon the transcript of the record of the order aforesaid and arguments of counsel, but because the court here is not yet advised of the order to be entered in the premises, time is taken to consider thereof.

[fol. 44] IN SUPREME COURT OF APPEALS OF VIRGINIA

JUDGMENT—November 11, 1937

This cause, which is pending in this court at its place of session at Staunton, having been fully heard but not determined at said place of session, this day came here the parties by counsel, and the court having maturely considered the transcript of record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore considered that the same be, and is hereby, affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Staunton, who will enter this order in the order book there and certify it to the said Circuit Court.

A Copy: Teste.

M. B. Watts, C. C.

IN SUPREME COURT OF APPEALS OF VIRGINIA

ORDER SUBSTITUTING PARTY PLAINTIFF—February 5, 1938

It being suggested to the court that since the appeal was taken in this case, the said Mary T. Ryan had departed this life, and that the Guaranty Trust Company has qualified as Executor of the Estate of the said Mary T. Ryan, deceased, and it being further suggested that it is the intention of the said Executor to file a petition for a Writ of Certiorari in the Supreme Court of the United States in this case to the action of this Court entered on November 11th, 1937, on motion of the said Executor it is ordered that this cause be revived in the name of said Executor, and that it be admitted as a party plaintiff in the place and stead of said Mary T. Ryan, now deceased.

Enter this:

Preston W. Campbell, Chief Justice, Supreme Court of Appeals of Virginia.

[fol. 45] IN SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the Justices.

MARY T. RYAN

v.

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE JOHN W. EGGLESTON—November 11, 1937

The petitioner, Mary T. Ryan, was during the years 1930, 1931, 1932, and for some time prior thereto, a legal resident of and domiciled in Nelson County, Virginia. During each of these years she received income from a trust, the corpus of which was held, managed, and controlled in New York, under the will of her husband, the late Thomas F. Ryan, who was at the time of his death a resident of that State. The income of the trust was derived from interest on bonds and dividends from corporations, and the share thereof to be paid to Mrs. Ryan was within the sole discretion of the trustees.

The State of New York assessed an income tax against the trustees on account of the income received by the trust during said years, including so much thereof as was paid to Mrs. Ryan. Virginia assessed an income tax against Mrs. Ryan on account of the income received by her from the New York trustees during each of said years. They paid the Virginia taxes under protest and in this proceeding seeks a refund. To the judgment of the Circuit Court of Nelson County denying the relief, this writ of error has been allowed.

No question is raised here as to whether the payments to Mrs. Ryan constitute income. Relief from the taxes is sought on two grounds:

(1) The Virginia statutes are not designed and intended to tax such income; and

(2) If the tax is within the Virginia statutes the assessment violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

With respect to her first claim petitioner argues: That for the purpose of income taxation the Virginia statutes

classify taxpayers under the separate and distinct headings of (1) Individuals, (2) Corporations and Partnerships, and [fol. 46] (3) Estates and Trusts; that only sections 50 and 51 of the Tax Code deal with taxation relative to estates and trusts; that these sections specifically impose a tax on the entire income of a discretionary trust, such as this, against the trustee and not against the beneficiary; and that hence there is no legislative authority for the assessment of these taxes against Mrs. Ryan, the beneficiary of this trust.

There is no claim by the Commonwealth that it has power to levy taxes against the New York trustees who are beyond the taxable jurisdiction of Virginia.

Section 51 provides for the filing of returns by the fiduciary and throws no light on the question here under discussion.

The pertinent provisions of section 50 are as follows:

"Sec. 50. *Estates and Trusts.*—1. The tax imposed by this chapter upon individuals shall apply to estates and trusts, which tax is hereby levied annually upon and with respect to the income of estates or of any kind of property held in trust, including:

* * * * * * *

"d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, * * *

* * * * * * *

"3. In cases under paragraphs a, b and c of subdivision one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, * * *. In such cases, the estate or trust shall be allowed the same exemption as is allowed to single persons by this chapter, and in such cases an estate or trust created by a person not a resident, and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under this chapter.

"4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of income is in the discretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary

is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary. * * *"

It is true that this section does not provide for the assessment of taxes against the beneficiary of a trust. Nor was [fol. 47] it designed for that purpose. The very reading of the section shows that it relates to the assessment of taxes against the trustee, that is, against the estate itself. The "tax is hereby levied annually upon and with respect to the *income of estates* or *of any kind of property held in trust,* * * *" (Italics supplied.) It is obviously designed to levy a tax on incomes received by a trust which is held, administered, and controlled in Virginia.

This section does not undertake to deal with the taxation of a beneficiary, such as Mrs. Ryan, who resides in Virginia and receives income from a trust held, managed, and controlled in another State.

But this does not mean that the Virginia statutes contemplate that no tax should be levied against Mrs. Ryan with respect to such income received by her.

We think the following provisions of the Tax Code authorize the levying of the tax here complained of:

"Sec. 24. *Definition of gross income.*—The term 'gross income,' as used herein, includes gains, profits and income derived from * * * rent, interest, dividends, securities or transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits and income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares. * * * *"

"Sec. 27. *Net income defined.*—The term 'net income' means the gross income of a taxpayer less the deductions allowed by this chapter; but the net income subject to the taxes imposed by this chapter shall be the net income less the personal exemptions allowed by this chapter."

"Sec. 38. *Individual income tax rates; residents and non-residents.*—A tax is hereby annually levied for each taxable year upon every resident individual of this State, upon and with respect to his entire net income as herein defined for purposes of taxation, at rates as follows:

* * * * * * * *

"The taxes levied by this chapter shall be assessed, collected and paid as provided by law."

"Sec. 41. *Who must file individual income tax returns and where.*—Every individual having a gross income for the taxable year of one thousand dollars or over, if unmarried, * * * shall make under oath a return stating specifically the items of his entire income and the items which he claims as deductions and exemptions allowed by this chapter.

[fol. 48] "Every resident individual who is required by this chapter to file a return shall file his return with the commissioner of the revenue for the county or city in which he resides, * * *"

Our conclusion is that the income of Mrs. Ryan from the trust comes within the definition of gross income in section 24, and that the tax is plainly authorized by section 38.

The petitioner next claims that even if the tax under review is authorized by the laws of Virginia, the assessment contravenes the due process clause of the Fourteenth Amendment.

She argues that the State of New York has levied a tax on the net income received by the trustees including such income as was paid to her; that the assessment of the Virginia income tax amounts to double taxation of her income; that double taxation has been condemned by the Supreme Court of the United States, as to tangible property in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; as to intangible property in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180, 67 A. L. R. 386; as to inheritance taxation in Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000, First Nat'l Bank of Boston v. Maine, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401; and that the same reasoning which condemns double taxation of the above types of property applies to and invalidates double taxation of incomes.

While double taxation by two States of the same property was formerly expressly held not to be prohibited by the Fourteenth Amendment (Shaffer v. Carter, 252 U. S. 37, 38, 40 S. Ct. 221, 64 L. Ed. 445; Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 330, 40 S. Ct. 558, 64

L. Ed. 931; Swiss Oil Corp. v. Shanks, 273 U. S. 407, 413, 47 S. Ct. 393, 71 L. Ed. 709), this doctrine has been repudiated with respect to property taxes levied in the case of tangibles, intangibles, and inheritance, as illustrated by the more recent cases relied on by petitioner and cited above. These recent cases have been lately approved in Senior v. Braden, 295 U. S. 422, 55 S. Ct. 800, 79 L. Ed. 1520, 100 A. L. R. 794, and in People of the State of New York v. Graves, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 409.

An analysis of these recent cases shows that each turns upon the determination of the situs of property for taxation. Where the situs is found to be beyond the jurisdiction of the State seeking to levy the tax, such tax is held to be prohibited by the due process clause of the Fourteenth Amendment. In each of the cases relied on by petitioner [fol. 49] the situs of the property was held to be beyond the jurisdiction of the taxing State and, therefore, in violation of the due process clause of the Fourteenth Amendment. And so in Commonwealth v. Appalachian Co., 159 Va. 462, 166 S. E. 461, we held that intangibles which had acquired a situs in New York, although owned by a Virginia corporation, could not be taxed in Virginia.

But the tax here under review is of a different nature. In Hunton v. Commonwealth, 166 Va. 229, 244, 183 S. E. 873, we held that the Virginia income tax is an excise tax and not a property tax; that it is not a tax on the property from which the income is derived, a view subsequently settled in People of the State of New York v. Graves, supra.

In no sense is the Virginia income tax levied on any property beyond the jurisdiction of this State. It is a tax levied upon Mrs. Ryan measured by the net income received and enjoyed by her here. She is subject to this tax in Virginia because she resides and is domiciled in this State, because she enjoys the protection of the laws of this State in the receipt and enjoyment of this income, and because she should bear her proportionate part of the expense of the government which affords this protection to her.

We think it is settled in Lawrence v. State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374, and in People of the State of New York v. Graves, supra, that the domicile and residence of the taxpayer in Virginia is a sufficient basis to sustain an income tax

although the income so received and enjoyed by the taxpayer may have originated in another State.

In Lawrence v. State Tax Commission, supra, the court, speaking through Mr. Justice Stone, upheld the constitutionality of a State income tax levied on a resident of Mississippi on account of income derived from business conducted by him in Tennessee. In disposing of the claim that the tax violated the due process clause of the Fourteenth Amendment the court said (286 U. S. pp. 280-1):

"It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to [fol. 50] receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship."

In People of the State of New York v. Graves, supra, decided on March 1, 1937, it was held that the State of New York had the right to levy an income tax upon the recipient of income residing in that State, although such income was derived from rents from lands located in another State and from interest on mortgages secured by real estate in another State. The court, again speaking through Mr. Justice Stone, said (300 U. S., p. —):

"That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in that state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the cost of government."

The opinion reaffirmed the doctrine laid down in Maguire v. Trefry, 253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739, that the State wherein the taxpayer was domiciled had the

power to levy a tax on the "net income from bonds held in trust and administered in another state."

The court clearly pointed out that the income received by the taxpayer in New York is a taxable interest separate and distinct from the land located in New Jersey, from which the income is derived.

Senior v. Braden, supra, so strongly relied on by the petitioner, is not controlling here. There the court held invalid a property tax levied on certain certificates entitling the holder to portions of the rents derived from lands in another State. This was based on the finding that the certificates represented an equitable interest in the land itself, which was beyond the taxing jurisdiction of the State.

It is argued with considerable force by the Attorney-General that both the New York and the Virginia income taxes can be sustained since they are levied on different taxable interests. The New York tax, it is said, is incident to the receipt of the income by the trustees in that State, while the Virginia tax is based upon Mrs. Ryan's receipt [fol. 61] and enjoyment of the income in the latter State. The protection offered to the trustees and to the property handled by them in New York does not extend to the receipt and enjoyment of the income by Mrs. Ryan in Virginia. Each of these separate taxable interests should bear its proportionate part of the expenses of the governments of the respective States. Hence it is claimed neither of these taxable interests can complain of the levy on the other.

This argument finds some support, we think, in the reasoning in Lawrence v. State Tax Commission, supra, and in People of the State of New York v. Graves, supra. See also, 48 Harvard Law Review (1935), at pp. 416 and 430.

Whether this view is sound and whether the validity of the tax levied by the State of New York on the trustees can be sustained, we need not decide since the validity of that tax is not before us. What we do decide, and all we decide, is that the domicile and residence of Mrs. Ryan in the State of Virginia is sufficient to sustain the validity of the tax levied against her by this State.

The judgment is affirmed.

A Copy: Teste.

H. H. Wayt, Clerk.

IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

NOTICE OF PRÆCIPE FOR RECORD.

Please Take Notice:

That on the 10th day of February, 1938, we shall apply to the Clerk of the Supreme Court of Appeals of Virginia, for a certified copy of the record in the above case, for use [fol. 52] in connection with an appeal to the Supreme Court of the United States for a Writ of Certiorari in the said case.

Respectfully, Caskie & Frost, Attorneys for Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, Deceased.

Legal service of the above notice is hereby acknowledged this 5th day of February, 1938.

Henry R. Miller, Jr., Attorney for the Commonwealth of Virginia.

IN SUPREME COURT OF APPEALS OF VIRGINIA

CLERK'S CERTIFICATE.

I, H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at its place of session at Staunton, Virginia, do hereby certify that the foregoing (together with Exhibit 'A, the original of which is filed) constitutes a true, full and complete transcript of the record and proceedings, entitled in this court "Mary T. Ryan v. Commonwealth of Virginia," consisting of the following, to-wit:

First. Copy of the printed record, pp. 1-42 and index.
Second. Copy of order partly hearing the case.
Third. Copy of order fully hearing the case.
Fourth. Copy of order, judgment of the Court.
Fifth. Copy of order reviving the case in the name of the Executor.
Sixth. Copy of opinion of the Court.
Seventh. "Exhibit" "A"—Will of Thomas F. Ryan (original filed).

Eighth, Copy of notice to Commonwealth of Virginia that an appeal will be made to the Supreme Court of the United States for a Writ of Certiorari.

NOTE.—Exhibits "C," "D" and "E" mentioned in record are not available, not being on file in this court.

[fol. 53] In testimony whereof, I have hereto set my hand and affixed the seal of the said Supreme Court of Appeals of Virginia, this the 10th day of February, A. D. 1938.

H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at Its Place of Session at Staunton, Virginia.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 28, 1938

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,292. Virginia, Supreme Court of Appeals. Term No. 811. Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, deceased, petitioner, vs. Commonwealth of Virginia. Petition for a writ of certiorari and exhibit thereto. Filed February 21, 1938. Term No. 811, O. T., 1937.

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